

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of
County Cub Foods,
Vendor No. W2618

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter initially came on for hearing before Administrative Law Judge Richard DeLong on January 6, 1988, in Minneapolis, Minnesota, pursuant to a Notice and Order for Hearing dated December 7, 1988. Shortly after the date of the hearing, Administrative Law Judge DeLong was incapacitated for an indeterminate period. By letter dated January 21, 1988, the Chief Administrative Law Judge, Duane R. Harves, communicated the fact of Judge DeLong's incapacity to counsel for both parties. In that letter, he stated that the case would be assigned to Administrative Law Judge Bruce D. Campbell for the issuance of Findings of Fact, Conclusions and a Recommendation to the Commissioner of Health on the basis of the existing record unless either counsel requested a rehearing of the case. With the consent of both parties, Administrative Law Judge Bruce D. Campbell reconvened the proceedings on February 26, 1988, in Minneapolis, Minnesota. On that date, a witness for the Department of Health presented rebuttal testimony and counsel made oral final arguments.

Robert T. Holley, Special Assistant Attorney General, Suite 136, 2829 University Avenue Southeast, Minneapolis, Minnesota 55414, appeared on behalf of the Minnesota Department of Health (Department); and Marc G. Kurzman, Attorney at Law, 2402 Stevens Avenue South, Minneapolis, Minnesota 55404, appeared on behalf of County Cub Foods owned by Joseph Lincoln (County Cub or Respondent).

The record herein closed on March 7, 1988, with the receipt by the Administrative Law Judge of the transcript of the hearing held on February 26, 1988.

This Report is a recommendation, not a final decision. The Commissioner of the Department of Health will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties

should contact Sister Mary Madonna Ashton, Commissioner, Minnesota Department of Health, 717 Delaware Street Southeast, Minneapolis, Minnesota 55440 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether the Respondent violated the program requirements of the Special Supplemental Food Program for

Women, Infants and Children (WIC), by providing unauthorized food items in exchange for WIC food instruments and employing improper price entry and identity verification procedures; and, if so, whether Respondent should be disqualified as a WIC food vendor for a six-month period, beginning December 7, 1987.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Special Supplemental Food Program for Women, Infants and Children (WIC) is a federal nutritional foods program regulated by the United States Department of Agriculture. The program is designed to make nutritional foods available to low income women who are either pregnant or breast-feeding, to infants, and to children under five years of age. The WIC program, in Minnesota, is administered by the Department of Health which uses local service agencies for primary client contact. The local agencies screen applicants for participation in the program and assess the specialized health and nutritional needs of prospective WIC participants. After nutritional evaluation by a "competent professional authority," participants receive food vouchers which allow them to obtain the special nutritional foods deemed necessary from authorized, participating retail vendors. The voucher lists on its front side the quantity of supplemental food the participant may obtain from each food group. At the time of program qualification, each WIC client also receives a WIC Program Authorization/Transfer of Certification Card, Dept. Ex. 5, which lists persons other than the named participant who are authorized to countersign a WIC voucher and negotiate it with a WIC vendor to receive the authorized supplemental food. Each month, a program participant or an authorized proxy may obtain a voucher valid for that month to be used to obtain that month's supply of authorized supplemental foods. Participants also receive periodic health monitoring at local clinics to determine progress or changed nutritional needs. On the back of the WIC voucher there is printed a list of acceptable supplemental food. The Department is required by federal regulations to prepare that list of WIC acceptable foods. The list is revised annually by the Department.

2. Pursuant to federal regulation, the Department has adopted a State Plan implementing the Minnesota WIC program. The State Plan in effect in 1987, Dept. Ex. 10, was adopted after a public hearing which was noticed in the State Register. The Department staff administering the WIC program includes eight employees responsible for federal funds of approximately \$27 million and 1900-2000 participating WIC food vendors.

3. County Cub Foods submitted an application to participate in the Minnesota WIC program as a retail vendor on November 20, 1985. Dept. Ex. 1.

In that application, the Respondent indicated that it was currently authorized to participate in the Minnesota WIC program through participation by a second store owned by Mr. Lincoln. The retail vendor application includes the following Statement of Vendor:

The Company . . . hereby applies for authorization to participate in the Minnesota WIC program. The vendor has received and understands the Minnesota WIC Compliance Statement. The vendor represents that it and its employees

will adhere to the Compliance Statement, and understands that any authorization to participate in the WIC program granted to it may be revoked for any violation of the Compliance Statement by it or any of its employees

Dept. Ex. 1, paragraph 9. Mr. Lincoln, as owner of County Cub Foods, signed the WIC program retail vendor application, which includes the Statement of Vendor.

4. When the Department received the Respondent's request for a food vendor application form, it provided Mr. Lincoln with a copy of the Minnesota Vendor Manual, WIC Program. Dept. Ex. 2. The Vendor Compliance Statement, attached as Exhibit F to the Minnesota Vendor Manual, WIC Program, inter alia requires:

In submitting this application to participate in the Minnesota WIC Program, the vendor agrees to comply with the following WIC Program vendor requirements:

C. Charge a price for the supplemental foods purchased with the WIC vouchers that is the current price, or less than the current price, charged to customers other than WIC participants. The vendor must write in the actual price of the WIC foods purchased before the participant countersigns the voucher. (Emphasis in original.)

D. Provide only those supplemental foods which are identified on the vouchers, in the amounts specified and which appear on the current WIC Acceptable Foods List

E. Redeem the vouchers only for authorized persons identified on the Minnesota WIC Program Authorization/Transfer of Certification Card and obtain the counter-signature of the authorized person in the appropriate space on the face of the voucher. The Vendor must review the Minnesota WIC Program Authorization/Transfer of Certification Card when the counter-signature does not match the signature and may not accept such vouchers if the Card is not presented or if the signature does not appear on the Card as an authorized proxy.

K. Provide all store personnel involved in handling WIC vouchers appropriate training and instructions in WIC procedures. The Vendor shall be held accountable for actions of all employees in the handling of WIC vouchers.

Dept. Ex. 2, Ex. F. Federal regulations require all authorized vendors to execute a food vendor contract. 7 C.F.R. 246.12(f) (1987). Respondent's participation in the WIC program as an authorized vendor was granted in December of 1985.

5. Pursuant to federal regulations, the Department is required to identify "high risk vendors", who may be abusing the program. The program administrators identify "high risk vendors" by two criteria: complaints received; and high charges reflected in vouchers submitted for payment. The Department has established "cut offs" that identify "high risk vendors" on the basis of price. It determines an expected price for particular items and adds up to 20 percent to that amount when the location of the vendor causes risk factors that would be reflected in its pricing. If more than 15 percent of the redeemed vouchers of a particular vendor are above the cut-off point, that vendor may be classified by the Department as a "high risk vendor". Thirty percent of the vouchers redeemed at County Cub exceeded the cut-off point.

6. There is no evidence in the record that the Respondent charged WIC participants higher prices for items than would have been charged to its customers generally.

7. Between the date of its initial participation in the WIC program and April of 1987, the Department received at least four complaints about Respondent's implementation of the WIC program. These complaints, which are not the subject of charges in this proceeding, also influenced the Department to classify Respondent as a "high risk vendor".

8. Classification of a vendor as a "high risk vendor" results, initially, in a "high risk visit" being paid to that establishment. In July of 1986, Department staff visited the Respondent and program requirements were discussed.

9. On several other occasions, the Respondent and the Department had official contact which specifically brought WIC program requirements to the store's attention. By letter dated January 9, 1987, the Department advised the Respondent as follows:

You, along with all store cashiers, should review items C & F of the attached Minnesota WIC Vendor Compliance Statement. This Compliance Statement was signed by the store owner who

agreed to abide by its contents as a condition of authorization to participate in the WIC program. Further evidence of noncompliance with any provisions in the WIC Compliance Statement will be grounds for termination of your WIC authorization.

Dept. Ex. 11. An additional copy of the Minnesota WIC Vendor Compliance Statement was sent to Mr. Lincoln with the letter of January 9, 1987. By letter dated April 15, 1987, the Department advised the Respondent as follows:

. . . WIC vouchers are issued for authorized foods only. Your responsibility as a WIC vendor is to make sure that the foods purchased are WIC approved and in the specified amounts. A WIC vendor has no authority to substitute non-authorized foods. (Emphasis in original.)

You, along with all store cashiers, should review item D of the attached Minnesota WIC Vendor Compliance Statement. This Compliance Statement was signed by an officer of your store who agreed to abide by its contents as a condition of authorization to participate in the WIC program. Further evidence of non-compliance with any provision of the WIC Compliance Statement will be grounds for terminating your WIC authorization.

Please remember that all authorized WIC foods are listed on the back of each WIC voucher. I have enclosed a copy of the WIC Acceptable Food List for easy reference.

Dept. Ex. 13.

10. Selection of a vendor as a "high risk vendor" may also, by federal regulation, result in employees of the Department visiting a vendor and, under the guise of being program participants, attempting to negotiate a WIC voucher for unauthorized items.

11. On May 4, 1987, two employees of the Department, Peter Kuzj and his supervisor, Patti Maier, Chief of the WIC section of the Department of Health, met to discuss a compliance buy at County Cub. They decided that Mr. Kuzj and an aide should visit Respondent and attempt to purchase unauthorized items. The decision to conduct a compliance buy was motivated chiefly by Respondent's classification as a "high risk vendor" and complaints received from former employees. The complaints received from the former employees were not a basis for Respondent's subsequent disqualification as a WIC vendor and are not charges in this proceeding.

12. On May 4, 1987, Mr. Kuzj and Linda Dorsey, an investigative aide, went to the vicinity of the store. Mr. Kuzj entered the store at approximately 2:15 p.m. He took with him a WIC voucher prepared by the Department in the name of a fictitious female participant. Her signature had been signed by a Department employee. He also carried a fictitious WIC Program Authorization/Transfer of Certification Card made out in the name of the same fictitious female participant. That card listed the erroneous name he used in the store as an authorized proxy for countersignature of the voucher. The investigative aide entered the store several minutes after Mr. Kuzj and was standing behind him in the checkout line to witness his WIC transaction with the cashier.

13. Mr. Kuzj approached the checkout line with an order including the items listed in Dept. Ex. 15, 3 and Dept. Ex. 17, 3. The cashier who waited on Mr. Kuzj was "obviously new and being trained by the regular cashier."

Dept. Ex. 15. The cashier serving Mr. Kuzj asked the more experienced cashier if Cheerios and Wheaties were WIC foods. The older cashier responded in the affirmative and then told the younger cashier that all WIC foods were listed on the back of each voucher. The cashier servicing Mr. Kuzj turned the voucher over, looked at the back of it where the WIC Acceptable Foods List is printed, and totaled the purchases. She then gave Mr. Kuzj back the WIC voucher and asked him to sign it. At that point, the clerk had not entered the price of the items on the voucher. Immediately after Mr. Kuzj signed the voucher, the cashier entered the price total on the voucher and asked Mr. Kuzj for a WIC Authorization/Transfer of Certification Card. He gave the card to her and she appeared to check the signatures.

14. During the May 4, 1987, compliance buy, Mr. Kuzj purchased the following items which were not included on the Department's WIC Approved Foods List: Wheaties (12-ounce box); Cheerios (10-ounce box); and two 12-ounce cans of frozen Tree Top apple juice. Dept. Ex. 15; Dept. Ex. 17.

15. There is no evidence in the record that the amount entered by the cashier on the WIC voucher for items purchased by Mr. Kuzj on May 4, 1987, was erroneous or higher in amount than would have been charged for the same items to a nonparticipant in the WIC program.

16. The voucher that Mr. Kuzj presented to Respondent's employee on May 4, 1987, was processed through the WIC reimbursement system and Respondent obtained payment for that transaction. Dept. Ex. 15; Dept. Ex. 17.

17. On or about August 12, 1987, Mr. Kuzj and his supervisor, Ms. Maier, decided to conduct a second compliance buy at County Cub. They wanted to attempt to obtain some unauthorized foods that were not within the same food categories reflected on the voucher presented. Again, a voucher was prepared in the name of a fictitious female WIC participant and Mr. Kuzj carried with him the same WIC Program Authorization/Transfer of Certification Card that listed the name he would countersign on the voucher as an authorized proxy for the fictitious participant. The voucher included in the food prescription 15 4.2-ounce jars of infant juice (100%). Dept. Ex. 16.

18. On August 12, 1987, Mr. Kuzj and Linda Dorsey went to the vicinity of the store. At approximately 1:50 p.m., Mr. Kuzj entered the store and began selecting items. Several minutes later, Ms. Dorsey also entered the store and followed him to the checkout line. Mr. Kuzj had selected two 8-ounce packages of Gerber infant rice cereal; one 8-ounce box of Gerber rice cereal with banana; seven 13-ounce cans of Similac, low-iron formula; one 46-ounce can of Dole pineapple juice; one 46-ounce can of Speas 100 percent natural apple juice; and one 46-ounce can of Libby's tomato juice. The cashier, a middle-aged male, looked at the can of tomato juice and inquired of another employee who was stocking the shelves whether the tomato juice was an authorized WIC food. The second employee stated that it was not and Mr. Kuzj returned the

can of tomato juice to the shelf. The cashier assisted Mr. Kuzj in selecting a 46-ounce can of grapefruit juice. The cashier totaled the purchases, entered the price on the WIC voucher and asked Mr. Kuzj to countersign the voucher. The cashier did not ask Mr. Kuzj to produce a WIC Authorization/Transfer of Certification Card to determine whether he was an authorized proxy. The cashier took the original receipt, attached it to the WIC voucher and placed them in an envelope, which he retained. At that point, Mr. Kuzj left the store with the merchandise.

19. There is no evidence in the record as to why the cashier placed the receipt and original voucher in an envelope or whether the voucher was ever deposited by the Respondent in its account for WIC reimbursement.

20. The following items purchased on August 12, 1987, are either not on the WIC authorized food list or, if on the list, are not within the purchases authorized on the face of the voucher presented by Mr. Kuzj: Gerber rice cereal with banana; 46-ounce can of Dole pineapple juice; 46-ounce can Big Tex grapefruit juice; 46-ounce can 100 percent natural Speas apple juice; and seven 13-ounce cans of Similac concentrated formula--low-iron.

21. The back of the WIC voucher and the WIC Approved Foods List distributed in November of 1986 includes as an approved food Similac with iron. Dept. Ex. 3. On January 14, 1986, federal regulations specified that any infant formula sold at retail must include a statement concerning its iron content. In late winter of 1986 or early January of 1987, the Department sent by first-class mail to its list of Minnesota WIC vendors a statement that infant formulas labeled "with iron or iron-fortified" would be acceptable to WIC, but that formulas labeled "low iron" would not be acceptable because the iron content was not sufficient to satisfy the federal requirements. Dept. Ex. 18. In that communication, the Department also indicated by the color of individual brand name cans which iron content formulas would be acceptable to WIC. The notification was not sent return receipt requested.

22. There is no direct evidence in the record that the Respondent actually received the notification.

23. The applicable federal regulations set nutritional standards that WIC approved foods must meet. 7 C.F.R. 246.10 (1986). The State WIC authority is required to specify foods which meet the nutritional requirements in its list of acceptable foods. Not all of the brand name items which meet federal nutritional standards are, necessarily, included on the State WIC Approved Foods List. Because of budgetary constraints and staff size, an annual review of approved foods is made by a Department of Health staff nutritionist. Even after that annual review, some food items in the appropriate food categories which meet federal nutritional requirements may not be included on the State WIC Approved Foods List. Some brand items may not be included either because the manufacturer has not requested that the State review a particular item for WIC compliance or because product changes are made or new items are marketed after the approved list has been prepared and circulated to the State's 1900-2000 WIC-approved vendors. The State WIC staff of eight employees must oversee program participation by all authorized vendors, local agencies and WIC clients, as well as assume fiscal responsibility for the approximately \$27 million WIC budget. The size of the staff of the Department responsible for the WIC program is fixed by federal regulation. 7 C.F.R. 246.3(d) (1987).

24. At the time of the compliance buys, Department investigative staff were aware which foods were on the authorized list, but their knowledge of the nutritional composition of the unauthorized food items purchased depended on information received from the Department's nutritionist or the general

reputation of products within the WIC section.

25. County Cub Foods is located at 3300 Fourth Avenue South, Minneapolis, Minnesota. Within a one-mile area of the store, 16 other retail establishments provide some or all of the WIC required foods, including special pharmacy purchases. Dept. Ex. 7. The 16 stores include convenience stores, general supermarkets, and two drug stores.

26. The Department is required, by federal regulation, to adopt policies governing the type and level of sanctions that may be imposed on WIC-approved food vendors for program violations. 7 C.F.R. 246.12(k)(1) (1987). Attachment V-B to Volume 2 of the 1987 Minnesota WIC Program State Plan divides vendor abuses into three groups of seriousness, specifying disqualifications of 30 days, three months and six months. Dept. Ex. 10, Attachment V-B.

Included in Group B Abuses, for which a three-month suspension may be imposed :
are entering the price on vouchers after the participant has countersigned it,
and failing to verify that vouchers are redeemed only by authorized persons identified on the Minnesota WIC Program Authorization/Transfer of Certification Card. Included in Group C Abuses, for which a disqualification of six months may be imposed, is providing cash, unauthorized food, or other items in lieu of authorized foods. Dept. Ex. 10, Attachment V-B.

27. The federal regulations authorize monetary fines and vendor disqualification from program participation for a period not to exceed three years. The Department has never informed WIC vendors that penalties will be cumulative. The Department disqualified Respondent from program participant for a six-month period because that sanction is consistent with its prior treatment of similar conduct and in accordance with the understanding of participating vendors.

28. By letter dated November 18, 1987, the Department disqualified County Cub Foods from participating in the WIC program for a six-month period, effective December 7, 1987.

29. By letter dated November 24, 1987, the Respondent contested the disqualification and requested a contested case hearing.

30. On December 7, 1987, the Department issued a Notice and order for Hearing, complying in all respects with applicable federal and state laws, rules and regulations.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of the Minnesota Department of Health and the Administrative Law Judge have jurisdiction in this matter pursuant to 7 C.F.R. 246.18 (1987), and Minn. Stat. 145.891, et seq., and 14.50 (1986).

2. The Department gave proper notice of the time of the hearing in this matter and has complied with all other relevant substantive and procedural requirements of statute or rule.

3. Since the Department is the party proposing the disqualification, it has the burden of proof to establish the propriety of its proposed action by a preponderance of the evidence. Minn. Rule pt. 1400.7300, subp. 5 (1985).

4. On May 4, 1987 and August 12, 1987, Respondent violated 7 C.F.R. 246.12(k)(1) (1987), Item D of the Minnesota WIC Vendor Compliance Statement and the federally approved State Plan by providing either nonapproved food items or unauthorized approved food items to the Department's investigator in exchange for a WIC voucher.

5. On May 4, 1987, Respondent violated Item D of the Minnesota WIC Vendor Compliance Statement, the provisions of the State Plan, and 7 C.F.R.

246.12(r)(3) (1987), when its cashier required the Department investigator to countersign the WIC voucher presented prior to entering on it the price of the items obtained.

6. On August 12, 1987, the Respondent violated 7 C.F.R. 246.12(p) (1987), Item E of the Minnesota WIC Vendor Compliance Statement, and the State Plan when its cashier did not review the Minnesota WIC Program Authorization/Transfer of Certification Card to determine whether an authorized person countersigned the WIC voucher.

7. A food vendor under the WIC program is accountable for the actions of its employees in the utilization of food vouchers and the provision of supplemental foods. 7 C.F.R. I L[,WHP K, Minnesota WIC Vendor Compliance Statement; 1987 State Plan, Volume 2, V-A-3.

B. The provision of nonapproved or unauthorized food on two occasions and lack of compliance with prescribed voucher handling procedures did not result from the isolated actions of an individual employee who did not understand WIC program rules. 7 C.F.R. 246.12(k)(1) (1987).

9. The disqualification of County Cub Foods from participation in the WIC program as an authorized vendor will not create an undue hardship for WIC food recipients.

10. A six-month suspension of Respondent from participation in the WIC program as an authorized vendor is in accordance with the sanctions stated in the State Plan and prior sanctions imposed on other vendors for similar conduct.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner disqualify County Cub Foods from participation in the Minnesota WIC Program as an authorized vendor for a period of six months, commencing December 7, 1987.

Dated this 15th day of April, 1988.

Judge BRUCE D. CAMPBELL Administrative Law

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve

its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Transcript Prepared.

Volumes I & 11 - Mary Ann Hintz, Route 4, Box 142, Isanti, MN
55040.

Hearing Transcript, February 26, 1988 - Karen Toughill, 2019
Laurel

Avenue West, Minneapolis, MN 55405.

MEMORANDUM

The Department, in its Notice and Order for Hearing, asserted four violations of WIC program requirements: the provision of unauthorized food in exchange for a WIC voucher on May 4, 1987; improperly requiring counter-signature of the WIC voucher before entry on it of the sale price during that May 4, 1987 transaction; the provision of unauthorized food in exchange for a WIC voucher on August 12, 1987; and a violation of the WIC proxy verification procedure during that same transaction. The Department presented, as witnesses in this proceeding, the investigator who conducted the two compliance buys and the Chief of the Department's WIC section. All applicable program documents were also introduced. The Respondent appeared at both days of the hearing only through counsel and presented no independent evidence relating to the circumstances of the compliance buys. Counsel for the Respondent stipulated that the facts contained in the reports prepared by the Department investigator after the compliance buys were accurate. Dept. Ex. 15, 17 and 16. Counsel also stipulated that his client was bound by the provisions of the WIC Program Retail Vendor Application signed by Mr. Lincoln on behalf of County Cub. The Respondent argues that the Department has not established that chargeable violations of the WIC program requirements occurred on May 4, 1987, and August 12, 1987, under circumstances that would justify vendor disqualification.

The Department has the burden of establishing by a preponderance of the evidence the charged program violations and the propriety of the proposed penalty. For the reasons hereinafter discussed, the Administrative Law Judge concludes that the Department has, in all respects, sustained that burden.

The Respondent admits that on both May 4, 1987, and August 12, 1987, the Department investigator exchanged a WIC voucher for foods that were not on the then current WIC Approved Foods List. Dept. Ex. 3. Moreover, on August 12, 1987, the investigator received items which, though on the WIC Approved Foods List, were not specified on the face of the voucher as fulfilling the special nutritional needs of the program participant. See Findings 14 and 20, supra. 7 C.F.R. 246.10(b) (1987), requires the State to identify foods which are acceptable for use under the program. The federal regulation lists nutritional

requirements of qualifying foods according to stated "food packages". 7 C.F.R.

246.10(c) (1987). The Respondent apparently argues that the Department must show not only that the items did not appear on the WIC Approved Foods List, but that the nonapproved items obtained did not meet the nutritional requirements specified in 7 C.F.R. 246.10(c) (1987). Absent such proof, the Respondent asserts that the Department has failed to establish a program abuse within the meaning of 7 C.F.R. 246.12(f)(xvii) (1987). The Department asserts that the fact that a particular item does not appear on the WIC Approved Foods List at the time of the transaction in question is sufficient to establish the violation.

The nonapproved food items purchased on May 4, 1987, included three items:
a 12-ounce box of Wheaties; a 10-ounce box of Cheerios; and a 12-ounce can of frozen Tree Top apple juice. At the time of the purchase, at least the box of Wheaties and the can of Tree Top apple juice did not meet federal nutritional standards as specified in 7 C.F.R. 246.10(c) (1987). The compliance buy on August 12, 1987, included both items that did not appear on the WIC Authorized Foods List (nonapproved foods) and items which though contained on the list of

approved foods were not within the supplemental food prescription of the Program participant. With respect to the nonapproved unauthorized foods, at least the Gerber rice cereal with bananas, the Similac formula--low-iron type and the Speas apple juice do not meet federal nutritional requirements under the WIC program. Moreover, the Respondent does not contest that the various fruit juices obtained on August 12, 1987, did not meet the food prescription contained on the voucher presented. That voucher specified small cans of infant fruit juice. The voucher was exchanged for large cans of juice not prepared for infants. Hence, even under the argument of the Respondent, on the two occasions at issue, food items were exchanged for WIC vouchers when those items were both nonapproved and not within the federal nutritional requirements specified for the WIC program.

The Administrative Law Judge, however, does not accept the argument of the Respondent that program abuse may only be demonstrated by proof that the non-approved food items exchanged for a WIC voucher did not meet the nutritional requirements specified by federal regulations. Only supplemental foods approved by the Department on its WIC Approved Foods List may be provided in exchange for a WIC voucher.

Pursuant to 7 C.F.R. 246.10(b)(1) (1987), the Department is required to identify foods which are acceptable for use under the program as meeting federal nutritional requirements. That same regulation requires the Department to provide local agencies with a list of acceptable foods and their maximum monthly quantities. The federal regulation does not require that the State include in the approved list every food or brand of food that meets the federal nutritional standards. The Respondent argues that the failure to include on the list all foods which satisfy federal nutritional requirements is "arbitrary and capricious" and, hence, no violation can be predicated solely on the contents of the list. As the Department testified, however, changes in product composition, the periodic offering of new brands and products, and the difficulty of revising the WIC Approved Foods List on more than an annual basis make it a practical impossibility to include on the list, at any one time, all brand foods that satisfy the federal nutritional requirements. As stated in 7 C.F.R. 246.10 (1987), and the governing statute, the purpose of the WIC program is to ensure that particularly vulnerable, low-income women and children receive food necessary to satisfy their particular nutritional requirements. Maximizing the selection of products from which those nutritional needs are met is not a stated or even implicit purpose of the program.

Agency action is "arbitrary or capricious" in the context of a rulemaking or program requirement when it has no rational basis. Manufactured Housing Institute v. Petterson, 347 N.W.2d 238, 247 (Minn. 1984); Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975). As noted in the Findings, the Vendor Compliance Statement requires the Respondent to only supply supplemental food that has

been included on the WIC Acceptable Foods List. Given the scope of the program that the Department must administer with the staff level and allowable administration costs limited by federal regulation, requiring adherence to the WIC Acceptable Foods List is entirely reasonable.

The Program, as currently designed, does not allow substitution of foods by the vendor or its employees. The Respondent argues that vendor employees are perfectly capable of making substitutions by reading the nutritional content contained on product packages. Although Respondent states that you

should be able to assume that people can read, that is precisely what counsel

later suggests the Administrative Law Judge should not do. The strength of the argument advanced can be judged by the fact situation in this case. On May 4, 1987, two clerks thought that products which did not meet federal nutritional standards were acceptable. On August 12, 1987, the transaction clerk apparently reached a similar conclusion.

The Respondent suggests that the provision of unauthorized supplemental food may not be a program violation under 7 C.F.R. 246.10(e) (1987), which allows the substitution of foods. The apparent suggestion is that a vendor clerk may exercise discretion in substituting foods. A review of that provision, however, reveals that the substitution of foods may only be done by

a State agency pursuant to a plan for substitution of foods accepted by the Federal Nutrition Service and only to accommodate different cultural eating patterns. Moreover, the State agency's plan must include a justification for

the proposed substitution, including a specific explanation of the cultural eating patterns which require the substitutions. Under no reading of that section is any substitution by vendor clerks authorized or even remotely suggested. Finally, there is no evidence that the vendor's clerks in this proceeding were attempting rationally to substitute foods during the transactions. That suggestion is particularly remote in light of the argument of

the Respondent that the clerk conducting the May 4, 1987, transaction, perhaps,

was unable to read print, including product labels.

The Administrative Law Judge concludes that the provision of nonapproved supplemental food is a program violation under the applicable federal regulations, the Minnesota WIC Vendor Compliance Statement and the State Plan.

The Respondent next challenged the right of the Department to impose any penalty for providing unauthorized supplemental food by asserting that the operative federal regulation is impermissibly vague. 7 C.F.R. 246.12(f) (1987). That provision, dealing with the content of the standardized vendor

agreement, provides that the agreement must contain a statement, in particular

wording to be determined by the State, that a vendor may be disqualified from

program participation because of "program abuse". The argument advanced by the Respondent, logically, includes two concepts. Initially, the argument appears to be that the generality of the language does not provide a person with reasonable notice of the conduct prohibited. The Respondent may also be

arguing that the phrase "program abuse" is so imprecise as to deprive a state

of authority to define specific actions constituting "program abuse".

The federal regulations do not contain a definition of the word "abuse" in

the context of 7 C.F.R. 246.12(f) (1987). The word is not, however, used in

any technical sense. In the absence of an indication that a special, technical meaning is intended, words in a statute or regulation are to be given their accepted ordinary meaning. Minn. Stat. 645.08(1) (1986). The accepted ordinary meaning of the term "abuse" is to use wrongly or misuse. Webster, New World Dictionary (Collins & World Publishing Co. 1976). Judicial decisions interpreting the word "abuse" in a variety of circumstances, have also defined the term to mean "improper use" or "to use improperly". *Erie - & N.E.R. Co. v. Casey*, 26 Pa. (2 Casey) 287, 318 (1856); *City of Baltimore v. Cornellsville & S.P. Ry.,_Co.*, 6 Phila. 190, 191, 3 Pitt. 20, 23 (1840). In *Brown v. Minnesota Department of Public Welfare*, 368 N.W.2d 906 (Minn. 1985), the Minnesota court defined the term "abuse" in the context of the State Medical Assistance Program

to include failure to abide by the regulations implementing the program. Hence, program abuse within the context of 7 C. F. R. 246.12(f)(1) (1987), is to be equated with the term "program violations" contained in 7 C.F.R. 246.12(k) (1987). That section authorizes the state authority to "establish policies which determine the type and level of sanctions to be applied against food vendors, based upon the severity and nature of the Program violations observed, and such other factors as the state agency determines appropriate "

In the 1987 State Plan, Dept. Ex. 10, the State has defined three levels of vendor abuses which merit some term of disqualification from program participation. That State Plan has been specifically approved by the federal WIC authority. The sanction contained in the State Plan for providing unauthorized supplemental food is a six-month suspension of vendor participation. Hence, both 7 C.F.R. 246.12(k) (1987), and 7 C.F.R. 246.12(f) (1987), clearly authorize the disqualification of a food vendor from program participation for the program violation here at issue.

Although the Administrative Law Judge has concluded that the operative federal regulation is not vague, the argument that the Respondent did not have notice of the prohibited conduct and its consequences is unsupported in the record. As discussed in the Findings, when the Respondent applied for participation in the Program, he received a copy of the Minnesota Vendor Manual, WIC Program, containing the Minnesota WIC Vendor Compliance Statement.

Item D requires a vendor to supply only those supplemental foods which are identified on the vouchers in the amounts specified and which appear on the current WIC Acceptable Foods List. The program application, signed by the Respondent contains the Statement of Vendor in which Mr. Lincoln agrees to adhere to the provisions of the Compliance Statement. It includes his understanding that revocation of his vendor authorization may result from "any violation of the Compliance Statement by it or any of its employees." Dept. Ex. 1. Moreover, as indicated in the Findings, on several occasions the Department wrote Mr. Lincoln, calling to his attention specific provisions of the WIC Vendor Compliance Statement, including Item D, and stating that violations of that Compliance Statement could result in revocation of his vendor authorization.

The Respondent then argues that no sanction may be imposed for the acts of an employee because the operative federal regulation contains no definition of the word "accountable". As previously noted, words in a statute or regulation are to be given their ordinary accepted meaning, unless the context clearly indicates that a specialized meaning was intended. The accepted common meaning of the word "accountable" is "responsible for". Webster, New World

Dictionary (Collins & World Publishing Co. 1976.) Judicial interpretations of the word "accountable", in a variety of legal contexts, have equated the word with the phrase "liable for". Sun River Cattle Co.,_Inc. v. Miners Bank of Montana, 164 Mont. 237, 521 P.2d 679, 684 (1974); Rock Island Auction Sales, Inc. v._Empire_Packing Co., 32 Ill. 2d 269, 204 N.E.2d 721, 723 (1965); Sullivan v. Carmony, 384 Pa. 486, 121 A.2d 174, 176 (1956).

The Administrative Law Judge does not conclude that the vendor, under all circumstances, is strictly liable for all acts of its employees. The federal regulation, itself, recognizes that a sanction may be inappropriate where the act is one of only an individual employee who did not understand Program rules.
7 C.F.R 246.12(k) (1987). That is not, however, this case.

The Respondent argues that the circumstances of the May 4, 1987 compliance buy demonstrate unusual conditions making a penalty inappropriate. The Respondent first states that the clerk who conducted that WIC transaction was a new cashier being trained by a more experienced person. However, the more experienced cashier who was providing training told the younger cashier that unapproved items were included in the WIC Approved Foods List. She then told the trainee to look on the back of the voucher for the list of foods. The trainee clerk did so and, yet, allowed the investigator to obtain the unauthorized foods. More specific notice or opportunity to verify whether the foods were on the WIC Approved List could hardly be imagined. The Respondent states that, perhaps, the trainee clerk was unable to read, or, at least, that the Department did not establish her literacy. County Cub, apparently, would place on the State the burden of establishing literacy as an element of a prima facie case and, perhaps, whether the employer had knowledge of any illiteracy.

Initially, it is unlikely that one functioning as a cashier who reads prices from items, could be illiterate. In this case, the cashier rang up the sale and later transferred that amount to the WIC voucher. Obviously, she was able to read the numbers. Moreover, the clerk whom the Respondent had selected to provide training, herself, gave erroneous information. Although the circumstances are not consistent with a conclusion that the clerk was illiterate, the Administrative Law Judge does not accept the Respondent's assertion that negation of illiteracy is an element of the State's prima facie case. It is important to note that the Respondent provided no evidence. The asserted illiteracy of an employee and the vendor's lack of knowledge of that circumstance are appropriately characterized as an affirmative defense. On such a defense, the Respondent would at least bear the burden of coming forward with evidence and, perhaps, the ultimate burden of persuasion.

The Respondent also argues that the sale of Similac formula--low-iron on August 12, 1987, should not be the subject of sanction because the WIC Acceptable Foods List does not clearly prohibit the providing of an infant formula labeled as low-iron. As noted in Finding 21, supra, in late 1986 or early 1987, the Department mailed to its list of WIC vendors a statement that infant formulas labeled low-iron were not acceptable foods for purposes of the WIC Acceptable Foods List. The Respondent asserts that the State must establish that County Cub actually received the document as an essential element of

proving the violation. County Cub suggests that such notifications should be sent "return receipt requested" to establish actual receipt by individual program vendors. The Department witness testified that the notification was sent by first class mail to the then current list of WIC vendors. The Respondent's name and address were included on the vendor list. At least in the absence of some evidence that the notification was not received, posting by first class mail is legally sufficient.

The Respondent next asserts that the August 12, 1987, compliance buy cannot be the basis of a sanction because the Department can't establish that County Cub ever received reimbursement for the voucher. In the absence of proven reimbursement, it argues that donating free food is not a Program violation. The State admits that it does not have the returned voucher showing reimbursement to the vendor. There are two explanations for that circumstance. Given the volume of WIC vouchers that are ultimately processed by a single bank in Maine, it is entirely possible that payment was made to the vendor on the voucher and it was improperly "end coded" by the Maine

bank. If the voucher was improperly "end coded" by the Maine bank, it would not be returned to the Department. It is also possible that the vendor never deposited the negotiated voucher in its bank account. If County Cub did not deposit the voucher, it would not have received monetary reimbursement for the items transferred to the Department investigator in exchange for the WIC voucher on August 12, 1987.

The Administrative Law Judge concludes that, in the context of a vendor disqualification for program violation, consideration need not be established.

It is important to note that, in addition to disqualification, additional sanctions are authorized under the federal regulations. See, 7 C.F.R. VHF N L &) 5 246.23 (1987). The imposition of those penalties specifically requires an improper receipt of program funds. The violation here asserted, however, does not. The program violation is providing unauthorized food items in lieu of authorized supplemental foods. 7 C.F.R. sec. 246.12(k) (1987). Suspension or termination of provider participation in a government program need not be premised only on improper reimbursement. 81 C.J.S., Social Security and Welfare, 136.

The argument of the Respondent, that providing free food cannot be a violation, has no application to the facts of the August 12, 1987, compliance buy. The employee accepted a WIC voucher in exchange for unauthorized food. Clearly, no donative intent appears in the record. As noted in the Findings, particularly vulnerable women and young children are selected to participate in the WIC program and are given a specific food prescription after nutritional evaluation. The number of vouchers received and even the amount of prescribed food are strictly limited both by federal regulation and Department implementation policies. The "currency" for satisfaction of the participant's special nutritional needs is the voucher. If the monthly voucher is taken by the vendor in exchange for food which does not meet the nutritional prescription, the adverse effect on Plan participants in the same, whether the vendor later receives reimbursement or not.

The Department has also established that the Respondent, on May 4, 1987 violated 7 C.F.R. 246.12(r)(3) (1987), and Item C of the Vendor Compliance Statement when the transaction clerk required countersignature of the food voucher prior to her entry on it of the total purchase price. The federal regulation clearly states that the Department may impose such a requirement. The Department has done so in the Vendor Compliance Statement and has provided a specific penalty for the infraction in the federally approved State Plan.

The Department testified that the requirement was the only practical method of insuring that the appropriate cost of authorized supplemental food was entered on the voucher. The Department likened a contrary sequence of countersignature to providing a vendor with, in effect, a blank check.

While the Department has established the violation and the propriety of its requirement, the countersignature and entry of total price during the May 4, 1987 transaction were almost contemporaneous. Apparently, in recognition of this fact, the Department did not propose a separate penalty for that violation. The Administrative Law Judge agrees that no separate penalty should be imposed for the technical violation.

The Department has also established that a violation of 7 C.F.R. 246.12(p) (1987), and Item E of the Vendor Compliance Statement occurred on August 12, 1987. As indicated in the Findings, during the August 12, 1987,

compliance buy, the clerk did not check the Transfer of Certification Card to ensure that the proxy countersignature was that of an authorized person. Under the State Plan, that infraction merits a vendor disqualification of three months. The Respondent has not contested the validity of that charged infraction.

The Administrative Law Judge has referred both in his Findings and this Memorandum to the status of the Respondent as a "high risk vendor", to the elements of that determination and to communications between the Department and the Respondent regarding complaints. The Administrative Law Judge has referenced the Respondent's status, other complaints and communications with the Department only to show reasons for the Department's compliance buys, to negate any inference of selective enforcement and to document particular notice of program requirements, including specified items in the Vendor Compliance Statement. Those references have not been used to establish the validity of any charged offense.

B.D.C.